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Supreme Court of the United States

No. 143—OCTOBER TERM, 1941

THE BOARD OF TRADE OF KANSAS CITY, MO., J. F. LEAHY, R. E. SWENSON, G. A. JOHNSON, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, ET AL.

APPELLANTS' PETITION FOR REHEARING

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To The Honorable, The Supreme Court of the United States:

Now come Appellants in the above-entitled cause and present this, their petition for rehearing, and in support thereof respectfully represent and show:

I.

That it is evident from the Opinion filed herein on January 5, 1942, that this Honorable Court misconceived and misconstrued the theory upon which this appeal was presented.

The question raised by Appellants was purely one of law, namely, whether the Interstate Commerce Commission may legally require one point on a through route to pay higher rates in order to transit grain than another point on the same or a comparable route.

Specifically and by way of illustration:

(1). Whether Omaha may be required to pay 22½ cents (per one hundred pounds) to transit grain from Kansas City to Chicago, when Falls City, Des Moines, and numerous other points on the same or comparable routes pay only 16 cents. (See Plate I, R. 723.)

(2). Whether Kansas City may be required to pay 22½ cents to transit grain from Omaha to Chicago, when Independence, St. Louis, and numerous other points on the same or comparable routes pay only 16 cents. (See Plate II, R. 724.)

(3). Whether Kansas City may be required to pay 18½ cents to transit grain from Omaha to St. Louis, when Lincoln, Topeka, Independence, Cedar Rapids, Dubuque, Davenport, and numerous other points on the same or comparable routes pay only 14 cents. (See Plate III, R. 725.)

Appellants urged that nothing could justify any difference in rates as between the points named, since the transportation and transit service and the cost thereof are exactly the same; that this constitutes discrimination and prejudice on the face of it, and hence that on the facts here presented, there is no room for administrative or expert judgment, because the discrimination shown is palpably unjust and forbidden by the Act, as this Court held in *Mitchell* v. *U. S.*, 313 U. S. 80.

Instead of taking this view of the case and treating this fundamental or basic question as one of law, this Honorable Court concerned itself mainly with certain incidental matters, which caused the basic issue to be submerged in considerations having to do with the ad-

ministrative functions of rate-making, and therefore applied the rule that the findings of the Commission are conclusive.

Thus, the Opinion states (p. 10)* that "The process of rate making is essentially empiric," and says in effect that such questions should be left to an expert body, thus overlooking the fact that the question raised is one of law, and that it is for the courts to see that administrative bodies stay within the law.

The process of rate-making may be empiric, but the question as to whether correct principles of law are applied in the process is not. Experience or observation in rate-making are not necessary to determine whether the Commission has violated the law in requiring different rates for exactly the same or comparable services.

Again the Opinion states that, "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course pursued by the Commission." (p. 11.)

We wish to respectfully say that Appellants raised no questions requiring technical competence and did not request nor expect this Honorable Court to pass upon the wisdom of the course pursued by the Commission. The question simply is whether under the law the Commission may require different charges for like services, and it requires no technical competence nor administrative wisdom to pass upon that.

Finally, the Opinion states:

> "It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove

* Page references are to the printed Opinion.

> —evils which, for all we know, would be far more serious than those complained of by the appellants." (p. 11.)

May we again respectfully say that Appellants did not request nor expect this Honorable Court to tinker with the grain rate structure, but to declare the law which should govern the Commission in tinkering with it.

What Appellants requested this Honorable Court to do was to say that the Commission could not lawfully require the primary markets to transit on higher rates than interior points, and then leave it to the Commission to correct the situation in such a way as not to restore any evils. As it is, the Commission, in correcting a situation which it deems improper, has seriously injured the primary markets by creating discrimination and prejudice against them, which is unlawful.

Incidentally, the Opinion itself suggests (p. 10) other methods the Commission might have employed to eliminate the evils which it thought existed, none of which would be prejudicial, if made applicable alike at primary markets and interior points. The fault with the present method is that it has not been given equal application. The Commission approved the rate-break combinations, on which both the primary markets and interior points are permitted to transit. Then it authorized exceptions to the rate-break combinations (overhead rates) to meet carrier competition, and prohibited transit on the exceptions at the primary markets, while continuing it at interior points, and thus created the discrimination and prejudice complained of.

The failure of this Honorable Court to recognize that the question raised on this appeal is one of law is also responsible for its misconception of other points we made in this case.

Thus, we urged that the opinion of the Commissioner who conducted the Grain Rate investigation and of other Commissioners should be taken into consideration and given weight in deciding the issue here involved.

However, the Court simply took the view that the fact that the Commission itself was of divided mind, "emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy."

The fact of the matter is that there was no difference of opinion on the facts involved. The members of the Commision differed primarily on the question of law, that is, on whether the Commission had the power to make the orders requiring different rates for the same service. The minority held that the Commission had no such power; that the intent of the Act was to uproot all discriminations and not to balance one against the other; and that there was no justification in law for the material disparity in rates.

Since the basic question here involved is one of law, the conclusion of the majority of the Commission should not be regarded as controlled by the doctrine of administrative finality, as it is for the Court to determine the applicable principles of law.

II.

This Honorable Court overlooked certain important considerations and misconceived certain fundamental principles of law in holding that the provision of the Act to Regulate Commerce, which forbids subjecting a transit point to undue and unreasonable prejudice or disadvantage, "* * * does not mean that the law compels identity of treatment for like services at different places."

This establishes a new principle of law, which, in its

application, we must respectfully say, would be extremely unfair, unjust and unreasonable, and would practically nullify the fundamental purpose of the Act. If the Act does not require that all shippers and localities are entitled to equal treatment for like transportation and transit services, then it has missed its great purpose, for even the common law recognized that public policy demanded equal treatment for all, though its processes made enforcement thereof inadequate and unsatisfactory. That was the primary reason for the creation of the Commission, and when it goes contrary to that principle, as it has in this case, its action should not be sustained.

This Court has repeatedly said that the great purpose of the Act was "to compel the carrier as a public agent to give equal treatment to all"; "to cut up by the roots every form of discrimination, favoritism and inequality"; and to "place all shippers upon equal terms." *New Haven* v. *I. C. C.*, 200 U. S. 361, 392; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467, 478; *United States* v. *Union Stock Yards*, 226 U. S. 286. In the recent *Mitchel case, supra*, this Court said that the evil of discrimination was "the principal thing aimed at."

If the emphasis in the statement here under discussion is to be put upon the words "at different places," then it is only necessary to remind this Honorable Court that the Act expressly prohibits discrimination and prejudice between localities, as well as shippers.

The Court based its conclusion upon the doctrine that, whether a preference or advantage is undue or unreasonable or unjust is a question of fact for the Commission to determine and upon which its decisions are not to be disturbed, unless, among other things, they are unsupported by evidence, or for some other reason amount to an abuse of power, quoting from *Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 481.

The fundamental and controlling fact in this case is that there is no difference in the transportation and transit service or the cost thereof, whether transit takes place at a primary market or at an interior point, which alone would justify a difference in rates, and hence the finding of the Commission that the preference or advantage to interior points is not undue and unreasonable is not supported by evidence. On the contrary, the facts mentioned support a finding that the primary markets are subjected to undue and unreasonable prejudice and disadvantage.

The case referred to apparently was also regarded as direct authority for the statement that the law does not compel identity of treatment for like services at different places. If it could be so construed, it would be the only one in which it has ever been so held, but reference to it will show that it does not support the proposition.

It is true that in that case the Commission approved a charge in excess of the line-haul rates to industries located on the Manufacturers Railway while the carriers continued to absorb the charges of the Terminal Railway, but this was largely due to the fact that the latter was owned by the trunk lines, while the former was owned by a large brewery and was regarded by the Commission essentially as a plant facility, the operating expense of which should be borne by the brewery. This and other differences in transportation and physical conditions were held by the Commission to justify the trunk lines in absorbing the charges of one and not of the other. And it was on these grounds that this Court sustained the Commission, as indicated by the following:

> "In the present case the negative finding of the Commission upon this question of undue discrimination was based upon a consideration of the different

> conditions of location, ownership and operation as between the Railway and the Terminal."

In view of the fact that this case turned upon the conditions mentioned, it should not be regarded as authority for the proposition under discussion. This Court has held a number of times in much clearer cases that only differences in transportation conditions will justify a difference in rates. In the leading case of *U. S.* v. *Illinois Central,* 263 U. S. 515, this Court said:

> "To bring a difference in rates within the prohibition of Sec. 3, it must be shown that the discrimination practised is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

Appellants respectfully submit, therefore, that the Commission exceeded its powers under the Act by attempting to correct a situation which it deemed improper in an unlawful manner—by violating the express provisions of the statute against discrimination and prejudice, and also, that the Commission's findings and conclusions are wholly unsustained and unsupported by proof, because the fundamental and controlling fact is that there is no difference in the transportation service or the cost thereof, and hence calls for a conclusion directly contrary to that reached by the Commission.

III.

This Honorable Court misunderstood and misconceived our contention when it said in the Opinion (p. 9) that, "The appellants do not claim that the Commission's findings are devoid of proof * * *".

This is correct only so far as certain incidental find-

ings are concerned, as to which it is our contention that, even if correct, they are not controlling, in view of the fundamental fact that there is no difference in the service or the cost thereof.

In short, it is our position that even if it is a fact that transit on the overhead rates tended to disturb the rate structure, reduce the revenues of the carriers, and give an undue preference to the users of transit balances over the users of proportional rates (which we shall show in the next section is not correct), this does not justify the discrimination and prejudice created against the primary markets. If these things needed correcting, that should have been done in a lawful manner, not by violating the express provisions of the Act.

IV.

This Honorable Court misconceived the law in sustaining findings of the Commission to the effect that, as stated in the Opinion, "discriminations were inseparable from the operation, side by side, of two systems of rates allowing transit of grain at primary markets," and misconstrued Appellants' contention in regard thereto in stating that this basic finding is not challenged. (p. 10; also 4 and 5.)

Appellants have vigorously challenged this finding from the beginning and it was presented to this Honorable Court in our Opening Brief (pp. 102 to 105) by way of pointing out, not only that the District Court misinterpreted it, but that the finding is erroneous as a matter of law.

As there pointed out, the original finding of the Commission was that transits on both rates "give an undue preference to the users of transit balances over the users of proportional rates" at the primary markets. 164 I. C. C. 645, R. 53. 205 I. C. C. 335, R. 313.

This finding, as indicated by the quotation on page 5 of the Opinion herein, is based on the fact that a large shipper with greater storage capacity may have a wider selection of billing and proportionately more transit balances than a small shipper, but that obviously does not constitute prejudice as between them, since both have equal opportunities and the use of transit balances is in proportion to their respective volumes of business.

It is evident, therefore, that this finding of the Commission is contrary to law. But even if it were correct, the Commission could not lawfully remove the preference by discriminating against the primary markets.

V.

This Honorable Court misapprehended certain findings of the Commission which were designed to give the impression that the primary markets were not substantially injured by its action.

The unfairness and injustice of the Commission's orders may be forcefully shown by considering the situation of Omaha in the concrete illustration used by the Court on page 6 of the Opinion.

As explained in that connection, the Commission first prohibited transit on the lower through rates at all points on rate-break routes, while permitting all points on other routes to transit as before. The result was that such interior points as Falls City and Nebraska City on routes through Omaha (a rate-break point) from Kansas City to Chicago had to pay 22½ cents while interior points on other routes not passing through Omaha paid only 16 cents.

This, the Opinion states, placed interior points on rate-break routes at a "substantial competitive disadvantage" with interior points not on such routes, which

is obviously correct. But what about Omaha? That city is in exactly the same position as Falls City and Nebraska City were. Why is Omaha not placed at a "substantial competitive disadvantage" with interior points on other routes?

As further explained in the Opinion, the interior points on rate-break routes requested the Commission to modify its orders so as to remove this discrimination against them, which was granted.

The Commission first prohibited transit at interior points on routes through the primary markets in order not to discriminate against the latter, and then granted transit to such points to remove discrimination between interior points.

In doing so, this Honorable Court says (p. 7) that the Commission found that this would not subject the primary markets to "any new substantial competition disadvantage," and apparently regarded that as justifying the Commission's action, thus overlooking the fact that the original discrimination against the primary markets was created when the Commission permitted the continuance of transit on the lower through rates at points on other routes, while prohibiting it at points on rate-break routes, and that the granting of transit at interior points on the latter therefore merely increased and intensified the discrimination already existing against the primary markets.

This finding therefore means in effect that, since the primary markets had already been seriously injured by the original discrimination, they would not be injured much more by creating additional discriminations, and constitutes an attempt on the part of the Commission to minimize or justify one discrimination by another created by it, as we pointed out fully in our Reply Brief herein. (pp. 35-39.)

The same misconception is inherent in the statement (p. 8) that the Commission found that to yield to the wishes of the primary markets would work "a hardship upon the milling industry at many interior points, with little or no benefit to the markets, which would still be at a disadvantage * * * with interior points on lower-rated routes."

This statement is based on the erroneous assumption that the primary markets desire equalization only with interior points on rate-break routes, when their complaint also involves equalization with interior points on other routes. It also assumes that equalization would be brought about by depriving interior points on rate-break routes of transit on the lower through rates, thus putting them on the same basis as the primary markets, but that is not the only way to correct the situation. The equalization can be brought about without working a hardship upon any one, and that would be of great benefit to the primary markets. The "competitive disadvantage" of the primary markets is just as serious to them as it was to other (interior) points on rate-break routes before the Commission removed the discrimination against them by permitting them to transit on the same basis at interior points on other (lower-rated) routes.

This explanation will also clear up the misleading statement of the Commission quoted in the foot-note at the bottom of page 9 of the Opinion to the effect that to rescind the previous modification (meaning that by which interior points on rate-break routes were granted transit on the lower through rates) would deprive such points of the same kind of transit as interior points on other routes, without materially benefiting complainants, "who would still be confronted with their major competition."

We did not ask the Commission to rescind the previous modification and thus deprive interior points on rate-break routes of transit, but on the contrary contended that the primary markets are entitled to transit on the same basis as all other interior points, regardless of which may be their "major competition."

It must not be forgotten that all appellants seek is equality of treatment. As the Commission itself said:

> "The relief sought * * * will merely permit the terminal markets *to transit on an equality* with interior transit operators on the same rates over the same routes." (Emphasis supplied.) 223 I. C. C. 235, 241, R. 618.

Appellants respectfully suggest that they are entitled to relief which will permit them *to transit on an equality* with all interior points, and that any action of the Commission which denies them that is unlawful.

VI.

This Honorable Court misapprehended our contention when it said that Appellants' "claim, in substance, is that whatever benefits the double system affords the primary markets are natural advantages, and that to deprive them of these advantages works an unlawful discrimination." (p. 9.)

Appellants wish to respectfully make it clear that that is not their claim. They do not claim that they are entitled to the double system as a matter of law, or that their natural advantages, if any, entitle them to the same. All they claim is that they are entitled to transit on the same rates as interior points, and that the denial of that right by the Commission cannot be justified on the ground that they may have certain natural advantages resulting from their location. In other words, that the Commission has no right to require Kansas City

to pay 6½ cents more to transit Omaha grain to Chicago than St. Louis pays, in order to offset any natural advantages which Kansas City may have. Incidentally, this illustration shows that the idea that Kansas City has natural advantages over other cities is merely an excuse for the discrimination, for this Court could almost take judicial notice of the fact that St. Louis has at least as many natural advantages as Kansas City.

With reference to the last paragraph of the Opinion (p. 11), it should be clear, therefore, that Appellants made no "suggestion that the orders of the Commission must be stricken down because they wipe out natural competitive advantages of the primary markets." Our suggestion simply was that, even if the primary markets have certain natural advantages, these may not lawfully be offset by charging them higher rates in order to transit than those paid by other points.

As to the repeated statement in the same paragraph that the rate structure was found to involve serious discriminations, we have already disposed of that by showing that the finding of the Commission upon this point is obviously erroneous.

In conclusion, Appellants desire to reiterate these propositions which they regard as determinative of the issues herein involved:

The fundamental and controlling fact in this case is that the transportation and transit services and the cost thereof at the primary markets and at interior points are the same, and hence a difference in rates is unlawful.

Under the circumstances the doctrine of administrative finality should not be regarded as a shield of immunity for the orders of the Commission here involved.

The Commission has no authority under the law to require that one point on a through route shall pay higher transportation charges in order to transit, than other points on the same or a comparable route.

The Commission has no authority under the law to correct a situation which it deems improper in an unlawful manner—by creating unjust discrimination and undue prejudice expressly prohibited by the Act.

Any other construction of the law will not only destroy the primary markets and leave them without a remedy, but accentuate and multiply the very wrongs which the Act was designed to prevent.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted and that the mandate of the Court be stayed pending disposition thereof.

Respectfully submitted,

M. W. BORDERS,
WILFRED WIMMELL,
SAMUEL J. WETTRICK,
Attorneys for Petitioners.

Certificate of Counsel.

I hereby certify that I am one of counsel for the Appellants and Petitioners in the above and foregoing Petition, and that the same is presented in good faith and not for delay.

Dated at Chicago, Illinois, this 28th day of January, 1942.

SAMUEL J. WETTRICK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 143.—October Term, 1941.

The Board of Trade of Kansas City, Mo., J. F. Leahy, R. E. Swenson, G. A. Johnson, et al., Appellants, *vs.* The United States of America, Interstate Commerce Commission, Board of Railroad Commissioners of the State of North Dakota, et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[January 5, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We have before us on this appeal orders embodying a series of determinations made by the Interstate Commerce Commission after inquiries into the grain rate structure stretching over a period of twelve years. The plaintiffs are millers, elevator companies, boards of trade, grain exchanges, and other business interests in Kansas City, St. Louis, Omaha, St. Joseph, Atchison, Leavenworth, and Minneapolis, the great grain centers known in the trade as "primary markets". The Commission's orders, they complain, create an unlawful discrimination under the Interstate Commerce Act, §§ 1(5), 2, 3(1), by prohibiting the interruption of shipments of grain for the purpose of being stored, marketed, or processed—technically characterized as transit privileges—at these primary markets on the lower rates under which these privileges are available at competing interior points (*i. e.*, grain centers other than primary markets). The District Court dismissed the complaint, 36 F. Supp. 865, and the case is here on appeal. Judicial Code § 210; 28 U. S. C. § 47(a).

As one phase of the effort to relieve agricultural distress, Congress in 1925 by the Hoch-Smith Resolution directed the Interstate Commerce Commission to make a thorough investigation of the rate structure of common carriers "in order to determine to what extent and in what manner existing rates and charges may be un-

just . . . or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist." 43 Stat. 801; 49 U. S. C. § 55.

Accordingly, on September 30, 1926, the Commission instituted a comprehensive investigation into the rates and practices affecting grain and grain products in the Western District.[1] The Commission called its proceeding "unusual", involving as it did "threescore and more of major issues, affecting every part of a vast territorial domain, each of which would ordinarily present a case of more than average importance". 164 I. C. C. 619, 697. Extensive hearings were held, and on the basis of a huge record of some 53,000 pages of testimony, including 2,100 exhibits, 20,000 pages of memoranda, exceptions, and oral arguments, the Commission on July 1, 1930, issued a report and order prescribing maximum rates for grain and grain products. 164 I. C. C. 619. A supplemental report and order were issued on April 13, 1931. 173 I. C. C. 511. Because the Commission did not take evidence relating to the drastic changes in economic conditions due to the depression occurring between the close of its hearings and the date of its orders, this Court set aside the orders. *Atchison, etc. Ry. Co.* v. *United States*, 284 U. S. 248. New and extensive hearings were thereupon held, and on October 22, 1934, the Commission in an elaborate report affirmed some of its earlier findings and modified others. 205 I. C. C. 301. Upon further consideration of the record, the Commission issued a supplemental order to remove discriminations between interior points. 215 I. C. C. 83. Dealers at the primary markets thereupon filed formal complaints seeking modification of that part of the Commission's orders which differentiated between transit privileges at primary markets and those at interior points. Hearings upon these complaints produced more than 7,000 pages of new testimony and over 250 exhibits. On July 27, 1937, the Commission authorized but did not require the carriers to meet the requests of the primary markets. 223 I. C. C. 235. The carriers having declined to act on this authorization, the Commission was

[1] The Western District is defined as the area "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois".

petitioned to enter a mandatory order. Proceedings were reopened, new arguments were heard, and on July 12, 1938, the Commission found that the prescribed rates did not subject the primary markets to any "undue prejudice and disadvantage". 229 I. C. C. 9, 16. Upon reconsideration this conclusion was affirmed on March 13, 1939. 231 I. C. C. 793. To upset these findings and to strike down the orders based upon them the present suit was filed.

Since the transit privilege is at the core of this litigation, a brief exposition of its mechanics and manipulations becomes necessary. The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. See *Transit Case*, 24 I. C. C. 340; *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 777-79; Locklin, Economics of Transportation (1935) 122-23, 629-31. The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay. The privilege belongs, as it were, to both the grain and its shipper. "The benefit attaching to grain shipped into the primary market is commonly so broad that it is transferable not only to another owner of the same grain, but to like grain coming from the same grain point." *A., T. & S. F. Ry.* v. *United States*, 279 U. S. 768, 778.

This privilege was available in the primary markets under two different rate schemes: (1) the "overhead through rate" and (2) the "rate-break combination".

(1) An overhead through rate is the rate from an originating point to the final destination, or to a gateway like Chicago, via a particular point. Thus, on a shipment of grain from Enid, Oklahoma, to Chicago via Kansas City, the overhead through rate was 38.5 cents per hundred pounds. Under this rate, grain reaching Kansas City could receive the various privileges of transit upon payment of 23.5 cents (the local rate from Enid to Kansas City)

upon the inbound shipment, and the difference (known as the "transit balance") between the overhead through rate, 38.5 cents, and the 23.5 cents inbound rate, upon the outbound shipment.

(2) On a "rate-break" basis, however, grain moved on a combination of the local or flat rate from the originating point to the primary market and the "proportional" rate from that market to a gateway or the final destination. The primary markets therefore came to be known as "rate-break" points. The "proportional" rate, representing an average of transit balances under overhead through rates, was designed to offset the competitive advantages of lines going through rate-break points as against lines starting there. The significance of the rate-break combination lay in the fact that for many points of origin there were no overhead through rates. In the above example, the proportional rate on outbound grain shipments from Kansas City to Chicago was 17.5 cents. The applicable rate on a shipment of grain from an originating point having no through rate to Chicago via Kansas City, with or without transit at Kansas City, was a combination of the local rate to Kansas City and the proportional rate from Kansas City to Chicago.

Thus, the difference between the two systems permitting transit at primary markets was the rate at which the outbound traffic moved. Under the rate-break combination the outbound shipment moved at the proportional rate; under the overhead through rate, it moved at the transit balance. The availability of these two rate bases, the Commission found, gave rise to serious discriminations: "Whether outbound shipments are at proportional rates or transit balances depends upon the selection of the inbound freight bill. If the inbound freight bill covers a shipment from an origin point from which there is no overhead route with transit to final destination, the outbound shipment is at the proportional rate. But grain from a point from which there is no overhead rate with transit can, under present practice, be substituted for grain from a point from which there is such an overhead rate with transit, and can be forwarded, upon presentation of the inbound expense bill covering inbound transportation from the latter point, at the transit balance due that expense bill." 164 I. C. C. 619, 634.

"The uncertainty in advance as to the outbound basis of charge arises from the dependence of that charge upon a check of the individual shipper's range of inbound billing. The outbound charge will be a transit balance if the inbound freight bill surrendered

covers a shipment from an origin from which there is a one-factor through rate less than the rate-break combination, and will be the higher proportional rate if the inbound freight bill surrendered covers a shipment from an origin from which there is no such one-factor through rate. Transit balances will vary with the measure both of the through rates and of the inbound rates to the transit point.

"The advantage to the user of the transit balance over the user of the higher proportional rate is evident, and increases in the ratio of the increase in the storage capacity of the respective cash-grain dealers at the rate-break markets. In other words, the greater the storage capacity the wider the selection of inbound billing and proportionately more transit balances." 205 I. C. C. 301, 335.

In the judgment of the Commission these practices "tended to disrupt the rate-break combinations, disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give an undue preference to the users of transit balances over the users of proportional rates, depress the price of grain at the rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers." 205 I. C. C. 301, 334.

Thus, the issue before the Commission was "whether the rates through the primary markets shall be made on the combination of flat rates to and proportional rates from the markets exclusively, or in part, or at all." Putting in the balance all the complex and conflicting interests, the Commission reached these conclusions: "Just so long as transit balances remain a substantial factor in the adjustment of rates from the primary markets, just so long will there be undue preferences between outbound shippers, as well as general instability in rates resulting from shippers seeking the translation of transit balances into proportional rates. . . . The best interests not only of the primary markets, but of the producer, consumer, and carrier will be served by the fullest possible application of the rate-break combinations through primary markets." 164 I. C. C. 619, 644-45.[2]

[2] The Commission specifically found that the adoption of the exclusive rate-break combination at the primary markets would give the markets substantial competitive advantages over interior transit points: "The proportional rate is applicable over all outbound lines upon surrender of an inbound freight bill covering an inbound shipment by rail, whether the transportation through the rate-break market is over a reasonably direct route or not. It is the equivalent in all respects, and more, of a local rate. . . . It is designed

Accordingly it prescribed new rate-break combinations[3] and made them applicable to transit both at primary markets and at interior points on routes passing through such markets.[4] The exclusive rate-break combinations were not made applicable to interior points not on routes passing through rate-break markets because the rate-break combinations had no relevance to these points. 164 I. C. C. 619, 645; 173 I. C. C. 511, 516-17.

A concrete illustration will rob this railroad jargon of its mystery. The through rate over numerous routes from Kansas City to Chicago was 16 cents. Some of these routes pass through Omaha, from which the proportional rate was also 16 cents. Other routes from Kansas City to Chicago do not pass through Omaha. Interior points like Falls City and Nebraska City, which are on routes through Omaha, had to pay 6½ cents, the local rate to Omaha, plus 16 cents, the proportional rate from Omaha to Chicago. But other interior points lying between Kansas City and Chicago on routes not passing through Omaha were required to pay only the 16 cents through rate. The net result was that interior points on routes passing through rate-break markets were placed at a substantial competitive disadvantage with interior points not on such routes.

Dealers at the interior points on routes passing through rate-break markets like Omaha petitioned the Commission to modify

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for the final gathering in by the rate-break market, for through transportation at less than the combinations of local rates that would otherwise apply, of grain not procurable under one-factor through rates less than the rate-break combinations (and resulting transit balances less than the proportional), because of the limitations on out-of-line and back-haul movement incident to the usual application of the one-factor through rates only over reasonably direct routes, and because of the further usual requirement of outbound shipment from the transit point over the rails of the inbound carrier. The proportional rates therefore open up to the rate-break markets the widest possible range of originating and distributing territory and afford, together with the larger number of carriers usually found converging inbound to and radiating outbound from the rate-break market, in the direction of the normal flow of the grain traffic, a decided advantage to that market over the interior transit point." 205 I. C. C. 301, 340-41

[3] The Commission revised existing rate-break combinations, reducing both the inbound flat rates and the outbound proportionals, and ordered that the prescribed rate-break combinations be made the exclusive basis of charge upon grain shipments moving through or stopping for transit at primary markets, and that overhead through rates less than the prescribed rate-break combinations be cancelled. 164 I. C. C. 619, 645.

[4] "The restriction is laid on the intermediate points other than the market, as well as upon the market, in order not to discriminate against the market in favor of the other intermediate points." 173 I. C. C. 511, 516.

its orders so as to remove this discrimination between interior points. They urged on the Commission that inasmuch as the fundamental purpose of the rate-break combinations was the establishment of uniform proportional rates on outbound shipments from primary markets, this purpose would not be frustrated if, in order to meet the lower through rate over competitive routes, transit on the through rate were permitted at interior points on routes through rate-break markets. The Commission found that the requested modification would remove the discrimination between interior points without subjecting the primary markets to any new substantial competitive disadvantages. 215 I. C. C. 83, 92-3. It found that under transit on an overhead through rate, dealers at interior points operated under important competitive disadvantages. The through rates were applicable only on "reasonably direct", not "markedly circuitous" routes, and outbound shipments from the transit point were usually limited to the rails of either the inbound carrier or a carrier participating with it in a joint rate via the transit point. Dealers at rate break markets, on the other hand, were free from such restrictions as to circuity of routes and choice of outbound carrier. The proportional rate was applicable to all lines from primary market to destination regardless of the inbound shipment's point of origin. The Commission found this to be a "substantial advantage to the transit operators at the rate-break markets over the transit operators at the interior transit points". 215 I. C. C. 83, 91. Accordingly, it modified its previous orders so as to permit transit at interior points on routes passing through a primary market "on the basis of a lower rate in effect over a competing route between the same points". 215 I. C. C. 83, 93.

To give this order practical application: At all interior points lying on routes from Kansas City to Chicago, transit privileges were available at the 16 cents rate, while shipments stopping for transit at primary markets along such routes, *e. g.*, Omaha, Atchison, Leavenworth, and St. Joseph, could move only at the rate-break combination of the 6½ cents inbound rate and the 16 cents outbound proportional rate.

The crux of this litigation is the validity of the differentiation between primary markets and interior points thus made by the Commission in the setting of the whole history of grain rate regulation.

Dealers at the primary markets complained against this differentiation. The Commission again canvassed the perplexing factors of the tangled problem before it. After pointing out that at the earlier stages of the grain rate inquiry "especially the markets" had supported the system of "rate-breaks at market points and overhead rates with transit at local points", the Commission observed: "No extensive rate structure can be made perfect nor can any rate structure be made permanent in any real sense in a changing world. . . . The two *Grain cases* together have demonstrated the impossibility, even on the part of those most experienced, most competent, and most expert, of seeing in advance the consequences of the particular changes in rates and practices here under consideration. Apparently nothing but experience can furnish a demonstration, and even the demonstration of experience may not prove to be conclusive unless it can be had on a scale sufficiently large and at intervals of time sufficiently close, and under substantially similar conditions." 223 I. C. C. 235, 245-46. It took occasion to recall these guiding considerations from its first report: "It would be impossible to take any comprehensive action without adversely affecting certain of the conflicting interests upon this record. Nothing but experience can demonstrate what the effect will be regarding certain of these issues. . . . All parties should cooperate to make careful note of the effect upon their interests, with the view to bringing to our attention from time to time, after a reasonable trial, those situations which may require further consideration." 164 I. C. C. 619, 698. To yield to the wish of the dealers of the primary markets would, the Commission found, work "a hardship upon the milling industry at many intermediate points, with little or no benefit to the markets, which would still be at a disadvantage in competing with other rate-break markets and interior points on lower-rated routes." 223 I. C. C. 235, 245. It concluded, therefore, that the record did not justify the mandatory order sought by the markets. Instead it authorized the carriers by appropriate tariffs to make "restricted departures from the exclusive application of proportional rates at rate-break points for a limited period of time" upon condition that such departures "should be surrounded by such effective safeguards as will make it impossible to reestablish" the discriminations incident to the double system of rates at primary markets. 223 I. C. C. 235, 246.

The carriers having declined to act on this authorization, the markets again sought a compulsory order. Upon reargument, the Commission concluded that "the granting of the transit requested would break down the rate-break adjustment prescribed in the *Grain Case;* that said adjustment should be abandoned, if at all, only upon demonstration of its failure as a workable adjustment, over an adequate period of normal conditions in the grain trade; that such a test has not been given the adjustment". 229 I. C. C. 9, 16.[5] Accordingly, the Commission dismissed the complaints and withdrew its previous permission to the carriers voluntarily to establish the rates requested by the primary markets. After a second reargument the Commission adhered to this conclusion. 231 I. C. C. 793.

The appellants do not claim that the Commission's findings are devoid of proof or that they were reached without observance of appropriate procedures. Their claim, in substance, is that whatever benefits the double system affords the primary markets are natural advantages, and that to deprive them of these advantages works an unlawful discrimination.

The Act forbids the Commission to establish a rate structure which would give one transit point an "undue or unreasonable preference or advantage" and would subject another point to an "undue or unreasonable prejudice or disadvantage". But this does not mean that the law compels identity of treatment for like services at different places. It prohibits only "undue" or "unreasonable" discriminations. "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . . , and upon which its decisions, made the basis of administrative orders operating *in futuro*, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *see Nashville Ry.* v. *Tennessee*, 262 U. S.

[5] To rescind the previous modifications, the Commission found, "would deprive these interior transit points of the same kind of transit accorded interior transit points on other routes and . . . would not materially benefit complainants, who would still be confronted with their major competition". 229 I. C. C. 9, 14.

318, 322; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352 53.

The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. Cf. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, 581-82.

The wisdom of the narrow scope within which Congress has confined judicial participation in the rate-making process is strikingly vindicated by the history of this controversy. The Commission's laborious investigation into the grain rate structure disclosed that discriminations were inseparable from the operation, side by side, of two systems of rates allowing transit of grain at primary markets. This basic finding is not challenged. And it is this fact which created the problem for solution by the Commission. There was no ready answer either in law reports or in economic experience. Any solution had to rest on informed judgment. And judgment in a situation like this implies, ultimately, prophecy based on the facts in the record as illumined by the seasoned wisdom of the expert body. In this perspective, the Commission had several choices before it—but all inevitably rested upon trial and error. It might have established the overhead through rate as the exclusive basis of transit at primary markets. It might have banked on the exclusive rate-break combination. It might have abolished the privilege of free transit entirely. Of only one thing could the Commission be completely certain: no action could be taken without "adversely affecting certain of the conflicting interests". 164 I. C. C. 619, 698. Weighing the prospective gains and hurts which were part of all of the proposed remedies, the Commission decided upon the exclusive rate-break combination. It did so, however, with full recognition that the wisdom of its action had to meet the test of experience. Therefore, it treated its conclusion as part of a continuing process, and requested the parties to give the system which it adopted a "reasonable trial", contemplating such further consideration as the practical operation of the system would require. The Commission refused the modifications asked by the appellants because the rate-break adjustment was "entitled to a thorough test over an adequate period of normal

conditions in the grain trade" and it had "received no such fair test up to the present time". To grant the requested modifications would "break down the rate-break adjustment". 229 I. C. C. 9, 15-16. These findings are incontestable.

That the Commission itself was of divided mind in the successive stages of this controversy emphasizes that the problem is enmeshed in difficult judgments of economic and transportation policy. Neither rule of thumb nor formula nor general principles provide a ready answer. We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. It is not for us to tinker with so sensitive an organism as the grain rate structure only a minor phase of which is caught in the record before us. If we were to grant the relief sought by the appellants, we would be restoring evils which the exclusive rate-break adjustment was designed to remove—evils which, for all we know, would be far more serious than those complained of by the appellants.

What we have said sufficiently disposes of the suggestion that the orders of the Commission must be stricken down because they wipe out natural competitive advantages of the primary markets. A rate structure found to involve serious discriminations among shippers, carriers, and transit points alike, is hardly a manifestation of nature beyond the Commission's power to repair.

Affirmed.

Mr. Justice ROBERTS is of opinion that the decree of the District Court should be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.